OCT 26 1950
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 337

PUETT ELECTRICAL STARTING GATE CORPORATION,
Petitioner,

v.

HARFORD AGRICULTURAL & BREEDERS' ASSOCIATION and UNITED STARTING GATE CORPORATION,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

This is an ordinary patent infringement action, brought under the equity provision of the patent laws, R. S. § 4921, the complaint, as filed, having demanded an injunction and an accounting. It was tried to the District Court without a jury, any right that petitioner may have had to a jury trial having been waived by withdrawal of a demand therefor (see footnote 34, petition, page 13).

The structure complained of is a simple magnet-operated door holding and releasing mechanism in which

there is never any detachment of the parts connecting the magnet-attracted armature to the swinging door. The patent alleged to cover this structure discloses only a simple gate latch which opens by complete detachment of two hook-like parts that connect the magnet armature to the door. The structure complained of is incorporated in horse race starting gates manufactured and owned by the respondent United.*

United, a New York corporation, has leased its gates to racing associations for use at racing meets held by tracks in New York, Maryland and Florida (R. 60, 61, 154, 175). Seeking to confine the litigation to the traditionally patent-favorable Fourth Circuit, the petitioner-patentee Puett avoided bringing action against its competitor United, who was suable only in New York, and instead sued Harford, whose race track is located in Maryland, and United intervened. There is organized horse racing in which starting gates having stalls with magnetically controlled doors are used in all of the Federal Judicial Circuits with the possible exception of the Tenth. Such gates are made by at least two manufacturers other than Puett and United, and there is no concentration of either manufacture or use of these gates in any one circuit. Of course United alone has built the particular gate structure here complained of and held not an infringement, but this is true of most patent infringement actions. Other than the reluctance of the petitioner-patentee Puett to subject its patent to the hazards of litigation outside the Fourth Circuit, there is nothing to prevent litigation on the patent in other circuits.

The petitioner's "Statement" is misleading to the extent that it implies the single patent here in issue relates

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* The petitioner is hereinafter sometimes referred to as "Puett" and the respondents as "Harford" or "United".

to a Puett starting gate which "revolutionized racing" or relates to any gate about which United might have learned through "confidential relationships with Puett" (petition, p. 3). The only gate that the petitioner Puett has ever made is that covered by its *Harris* patent No. 2,309,952. The gate of the *Harris* patent is the only one that could have "revolutionized" anything. It is the only gate about which United could have obtained any information prior to September of 1946 when United was organized and any alleged confidential relations between Puett and United's personnel were at an end (R. 73, 158). The petitioner concedes that the *Harris* patent is not here in issue (petition, p. 4). There are no "obvious economic reasons" why Puett did not use the *Whann* patent gate. The original application on which the *Whann* patent here in issue is based was filed September 9, 1941 (R. 181). The apparent reason why the *Whann* patent gate was never built or used is that it would be dangerous to horses (R. 172, 293, 294). Petitioner's assertions that respondent United "has used Puett's (Whann) 1948 patent" (petition, p. 3) begs the question decided adversely to petitioner by the Court of Appeals. That is the question respondents here assert is entitled to no further review.

The District Court based its conclusion of infringement solely on documentary evidence comprising the patents, and its own inspection of models* of the patent structure, the accused structure of respondents, and a prior art patent. The District Court made no reference to any oral testimony of experts or others and, in fact, on the question of infringement, did not refer to *any* evidence other than the models and the patent.

> "The starting gate of United, which Puett claims infringes both of the patents in suit, is very similar

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* The models were accepted by petitioner as correctly showing the critical elements of the devices they represent (R. 152).

in numerous structural features to the starting gates constructed in accordance with the specifications and claims of both of those patents. This is made clear by an inspection of the models introduced in evidence and which have been of very great help to the Court in comparing one device with another." (R. 8.)

* * * *

"Turning now to a more analytical examination of the models of both patented devices and of the device of United, and taking up first the Whann patent, * * *" (R. 9).

* * * *

"An examination of the two models shows that this difference in location merely requires, for the performance of the same function in one device, * * *" (R. 11).

There is nothing in the record or the opinion indicating that the District Court's conclusion of infringement was based on any of the oral testimony referred to at page 12 of the petition.

The Court of Appeals similarly based its conclusion of non-infringement solely on the same patent documents and models forming the basis of the District Court's conclusion, and each of the three learned Judges of the Appellate Court personally and repeatedly inspected the models and observed their operation during the argument on appeal. There is no reference to indicate that the Appellate Court reviewed or referred to any oral testimony in concluding that the District Court's finding of infringement was erroneous.

Summary of Argument

I

There are no special or important reasons for granting the writ. The conclusion of infringment in the Trial Court and in the Appellate Court was based solely on documentary and physical evidence that was not in dispute, and not on oral testimony The subject matter and the evidence were such that the question of infringement resolved itself into a question of law properly reviewable by the Appellate Court.

II(a)

The Court of Appeals for the Fourth Circuit has not in this or other cases exceeded its powers of review as set forth in Rule 52(a) of the Rules of Civil Procedure and as interpreted by this Court and followed by Courts of Appeals of other Circuits. The Appellate Court in this case has followed the accepted and usual course of judicial proceedings in patent infringement actions where the question of infringement is readily determinable from a comparison of undisputed documentary and physical evidence.

II(b)

Amendment VII of the United States Constitution restricts appellate review only with regard to facts tried by a jury. In the present case, the facts were tried by the Court without a jury and any right to a jury trial was waived by petitioner; wherefore Amendment VII has no application in the present case.

III

In stating its inability to agree with the District Court's conclusion of infringement and giving its reasons based on the undisputed evidence in the case, the Appellate Court acted within the provisions of Rule 52(a). A statement of inability to agree, with an analysis of the reasons for disagreement, is a finding that the District Court's conclusion was clearly erroneous within the meaning of Rule 52(a).

ARGUMENT

I.

There are no special or important reasons for granting the writ sought by the petition. There is no conflict between courts of different circuits. No important or unsettled question of law is decided in conflict with applicable decisions of this Court, and there has been no departure from the accepted and usual course of judicial proceedings.

The litigation is a private controversy between private parties under the old and oft-interpreted patent statutes. The issue decided adversely to petitioner by the Court of Appeals for the Fourth Circuit is whether United's non-detaching latchless door releasing mechanism infringes Puett's patent on a detaching hook-latch door releasing mechanism (R. 294).

Looking to the realities of the controversy and not to its technicalities, the Court of Appeals found that the mechanism of the patent had never been made or used and accordingly construed the patent claims as limited to what was new over the prior art as shown by the patent specification (R. 291, 292). The Court of Appeals thereby followed a rule of patent construction well established by this

Court and by other Courts of Appeals.* The Court of Appeals found that the similarities between the patent and the United structure were largely old expedients, whereas the differences therebetween resided in that to which the patent must be limited to avoid anticipation (R. 294). It accordingly found the conclusion of infringement reached by the District Court clearly erroneous, stating that it was unable to agree with that conclusion.

In concluding that there was no infringement, the Court of Appeals did not review what witnesses had said, which would have been significant only if the Court could not understand the patent language or the technical aspects of the patented subject matter without resort to extrinsic evidence. Like the District Court, the Court of Appeals found the door holding hook latches and links involved were so simple that resort to testimony in explanation thereof was unnecessary. There was no dispute of facts as to the patented structure, the accused United structure or the prior patent structure, all of which were clearly represented by simple models that Puett agreed were correct (R. 152). The question of infringement was therefore properly determined on appeal, as it had been in the District Court, that is, by a mere comparison between the disclosure of the patent and the accused United structure. In such a situation, the question of infringement resolves itself into a question of law, peculiarly within the province of the Appellate Court.**

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* *Deering* v. *Winona Harvester Works,* 155 U. S. 286, 296; *Thompson* v. *Westinghouse Electric & Mfg. Co.,* 116 F. 2d 422, 425 (2 Cir., 1940).

** *Sanitary Refrigerator Co.* v. *Winters,* 280 U. S. 30, 36; *Singer Mfg. Co.* v. *Cramer,* 192 U. S. 265, 275; *Heald* v. *Rice,* 104 U. S. 737, 749.

II.

Faced with a lack of any conflict, public interest or departure from established interpretation of the patent statutes, petitioner urges that the Court of Appeals has exceeded its powers of review as allegedly limited by Rule 52(a) of the Rules of Civil Procedure and by the Seventh Amendment of the Constitution, in overturning the Trial Court's conclusion of infringement, and further urges that the Court of Appeals has similarly exceeded its powers in other cases (Petition, pp. 6 to 18). In so doing, petitioner has either overlooked or ignored this Court's pronouncements in *United States* v. *Gypsum Co.*, 333 U. S. 364, 394, 395, 396, which dispose of both of petitioner's contentions. In the *Gypsum* case, which was a direct appeal to this Court from a three-judge statutory Trial Court, this Court decided:

> "* * * Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies[12] or by a jury,[13] this Court may reverse findings of fact by a trial court where 'clearly erroneous' " * * * "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (333 U. S. at 395).
>
> (Citing authorities at [12] and [13].)

II(a).

With regard to the effect of Rule 52(a), it is established beyond question that the rule makes applicable the equity practice prevailing at the time the rule was adopted.

This Court so stated, and stated the prevailing equity practice as follows in *United States* v. *Gypsum Co.*, 333

U. S. 364, 394, 395:

> "* * * In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. * * * It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice.[11] * * * The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however.[14]
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> * * *
>
> "The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact."
>
> (Citing authorities at [11] and [14].)

Following this decision, the Court of Appeals for the Second Circuit adopted and restated the interpretation of the rule so enunciated as follows:

> "* * * Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) If

he decides a fact issue on written evidence alone, we are as able as he to determine credibility and so we may disregard his finding.[6] (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful,[6a] or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance.[6b]'' *Orvis* v. *Higgins,* 180 F. 2d 537, 539 (2 Cir., 1950).

(Citing authorities at [6], [6a] and [6b].)

The Courts of Appeals for other circuits have uniformly applied the rule as so defined, namely, that in non-jury cases, where the evidence is largely documentary or physical or not in dispute (as were the patents and the models relied on by the District Court herein), as distinguished from conflicting oral testimony, the appellate court is as competent to review and interpret the evidence as was the trial court and is not precluded from so doing by Rule 52(a).*

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* *Sbicca-Del Mac* v. *Milius Shoe Co.,* 145 F. 2d 389, 395, 396 (8 Cir., 1944);
Sales Affiliates v. *National Mineral Co.,* 172 F. 2d 608, 613 (7 Cir., 1949);
Letcher County v. *De Foe,* 151 F. 2d 987, 990 (6 Cir., 1945);
Butex Gas Co. v. *Southern Steel Co.,* 123 F. 2d 954, 955 (5 Cir., 1941);
Kuhn v. *Princess Lida of Thurn & Taxis,* 119 F. 2d 704, 705, 706 (3 Cir., 1941);
Hanovia Chemical & Mfg. Co. v. *David Buttrick Co.,* 127 F. 2d 888, 891 (1 Cir., 1942);
Home Indemnity Co. of New York v. *Standard Acc. Ins. Co.,* 167 F. 2d 919, 930 (9 Cir., 1948).

In the decisions criticized at pages 7 to 10 of the petition, and in the present case, the Court of Appeals for the Fourth Circuit has applied Rule 52(a) precisely as enunciated by this Court in the *Gypsum* case and by the appellate courts of other circuits.

In *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F. 2d 912 (petition, p. 7), the primary defenses upheld by the District Court and overturned by the Court of Appeals were invalidity, non-infringement and a finding that defendant's employees independently invented the patented device. The Court of Appeals relied wholly on undisputed documentary evidence, comprising the cited patents, in reversing the conclusion of invalidity (80 F. 2d at 917). It compared defendant's structure to the patent in concluding that there was error in the trial court's finding of non-infringement (80 F. 2d at 921) and it based its conclusion that defendant had not independently invented the device on documentary evidence comprising letters between the parties and other evidence "as to which there is no controversy" (80 F. 2d at 927). The defendant-appellee filed a petition for writ of certiorari for the reason, *inter alia*, that the Appellate Court failed to follow the rule of this Court with respect to the weight to be accorded factual findings of the trial judge.* The petition was denied by this Court.**

Similarly, in *Connecticut Paper Products, Inc.* v. *New York Paper Co.*, 127 F. 2d 423, referred to at page 7 of the petition, the Court of Appeals reached its conclusion that the second mechanical patent was invalid by examination of the patent itself (127 F. 2d at 427, 428) and exami-

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* *C. M. Kemp Mfg. Co., petitioner* v. *William F. Hoeltke, respondent*, October Term 1935, No. 901, Reason No. 6 at page 6 of the Petition.

** 298 U. S. 673.

nation of an actual prior device of plaintiff and of the prior art (127 F. 2d at 429). Thus, all the documents or physical things on which the Court based its conclusion comprised evidence as to which there was no dispute and which the Appellate Court was as competent to weigh as was the Trial Court.

In *Triumph Explosives, Inc.* v. *Kilgore Mfg. Co.*, 128 F. 2d 444, referred to at page 7 of the petition, both the District Court and the Court of Appeals based their conclusions as to validity and infringement on the undisputed documentary patents in suit and prior patents alone (128 F. 2d 444, at 446, 447, 448; 37 F. Supp. 766 at 770-774). The piece of evidence to which the Appellate Court said its first conclusion failed to give sufficient weight was a British patent, which was physically before the Trial and Appellate Courts (128 F. 2d at 448, 449).

In *Lever Bros Co.* v. *Procter & Gamble Mfg. Co.*, 139 F. 2d 633, the District Court based its conclusion that the patent was limited and so not infringed by the defendant's soap on "the whole evidence in the case"* including undisputed evidence comprising the patent itself, the file wrapper, the prior art, and observation of the soap products in issue. The Court of Appeals reviewed all of the evidence and expressly found that "the District Court erred in holding that Bodman's claims should be limited to a process around 190°F."** As to the evidence of what petitioner calls "an important and scientific witness" (petition, p. 8), neither the structure nor the manner of operation of the mixer involved was in dispute and the Court found the witness's conclusion was in conflict with the undisputed facts evidenced by such structure and

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* 49 F. Supp. 443, 461.
** 139 F. 2d 633, 637.

operation,* just as this Court found the testimony to be in conflict with the contemporaneous documents in the *Gypsum* case, *supra* (333 U. S. 364, 396).

In the case of *Binney & Smith Co.* v. *United Carbon Co.*, 125 F. 2d 255, discussed at page 9 of the petition, the District Court held that if the claims were valid and broadly construed, they were infringed (37 F. Supp. 779, 780, Finding 5), but that the claims could not be broadly construed because "not sufficiently definite" (*Id.* at 780, Finding 4). The Court of Appeals adopted the District Court's finding that the claims were infringed if valid and broadly construed (125 F. 2d 255, 260), examined the undisputed evidence comprising the patent itself and the prior art, and decided the claims were both valid and definite (125 F. 2d 255, 258, 259). The Appellate Court accordingly applied the Trial Court's finding of infringement solely on the basis of undisputed documentary evidence. This Court reversed, holding the claims indefinite in view of the uncontradicted testimony of one Weigand as to the meaning of the claim language (317 U. S. 228, 233), thus upholding the propriety of reviewing conclusions based on undisputed factual evidence.

In *Jordan* v. *Hemphill Co.*, 180 F. 2d 457, the Court found that contemporaneous documents, comprising sketches, drawings and letters, established that a machine admittedly demonstrated to the Holeproof Hosiery Co. prior to the critical patent date was equipped with the patented gap closers (180 F. 2d 457, 462, 463, 464). The Appellate Court based its findings on "all the evidence" (*Id.* at 464) and found the District Court's rejection of the defense "erroneous" (*Id.* at 464, 465). The finding was again based on uncontradicted documents which the Appellate Court could appraise as well as the Trial Court.

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* 139 F. 2d 633, 642, 643.

The petitioner misstates the basis for the Appellate Court's finding of commercial success in *Florence-Mayo Nuway Co.* v. *Hardy,* 168 F. 2d 778, 780 (Petition, pp. 10 and 11). The Court said:

> "* * * There is evidence that strongly supports the view that, by the use of this device, tobacco was cured in less time and more satisfactorily than by other methods, so that it weighed more and brought a better price on the market. *Whether this view was justified or not,* the defendants apparently thought so; for their infringing device adopted the heart of the Mayo invention, viz., the intake pipe delivering outside air under the hood over open flame burners, and their advertisements proclaimed that tobacco cured in this way would be of better grade and would bring a better price on the market. *Theories of experts pro and con were given in evidence; but more convincing than their evidence is the fact that the Mayo invention met the pragmatic test.* Practical raisers and curers of tobacco began using it to such an extent that the old devices ceased to be sold." (Emphasis added.)

The evidence relied on by the Appellate Court was not the conflicting evidence of experts but the undisputed fact that the patented device was successful and replaced what had gone before it.* It decided as a matter of law that what actually happened was entitled to more weight than was the testimony of experts. That an earlier patentee may have solved the problem has no bearing on the propriety of the Appellate Court's finding when based on undisputed evidence.

In the present case, the District Court based its finding of infringement solely on the patent and the models of the

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* The District Court also found that the patented device, as well as the infringing device, was successful. See *Florence-Mayo Nuway Co.* v. *Hardy,* 75 USPQ 137 at 141.

devices which were simple and readily understandable without reference to expert or other testimony. This same evidence which formed the basis for the District Court's conclusion was before the Appellate Court and was as readily susceptible to analysis by that Court as by the District Court. Petitioner does not point to any instance in which the Appellate Court reviewed or reversed any finding of the District Court based on disputed evidence or on oral testimony of any kind (*supra*, pp. 3 and 4).

We disagree with petitioner's assertion that defendant's witnesses admitted every element of the patent claims was found in the accused structure, but we believe the point irrelevant to the issues raised by the petition. The District Court's conclusion of infringement was based solely on the undisputed patent documents and physical models—evidence which the Appellate Court was in as good a position to evaluate as was the Trial Court.* On this same undisputed evidence, the Court of Appeals found the conclusion of infringement erroneous. If the oral testimony had been at variance with the conclusion impelled by the documents and models, it could not have been accorded controlling weight.** The essential difference between the detaching claw-like parts of the patent and the non-detaching link of the United structure is unassailably established by the documents (compare detachment and non-detachment of parts 51-52 and 6-3 colored red and blue at R. 136 and 137; R. 294).

In the vast majority of patent infringement actions, the question of infringement is determined in the Trial Court by visual comparison of undisputed evidence comprising the patent and drawings or models of the thing alleged to infringe. In such cases, the Appellate Court is as competent as the Trial Court to review the conclusion of

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* *Orvis* v. *Higgins*, 180 F. 2d 537, 539 (2 Cir., 1950).

** *United States* v. *Gypsum Co.*, 333 U. S. 364 at 396.

infringement, as in so doing it does not re-weigh evidence depending on the demeanor of any witness or on any other happening at the trial. Certainly where the subject matter is visible and simple, so that the comparison can be made without the aid of expert testimony, the three Judges of the Appellate Court are at least as competent to appraise the question of infringement as is the District Judge. It is true that in some patent cases the subject matter is complex and obscure so that the oral testimony of technical experts is necessarily the only basis for a conclusion on validity or infringement, and in such cases the upsetting of a finding based on such technical evidence in the form of oral testimony may violate the rule. Thus, in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, the space between the arc welding electrodes where the electric arc was asserted to have been eliminated was not visible because hidden from view by the flux, and the Appellate Court's review of a finding of invalidity based on oral testimony that the arc was still present, although shielded by the flux, was improper (*Id.* at 279). But the operation of the simple door latching structures involved in the present case does not rise to the dignity of a complex scientific demonstration or examination. The hook latches of the patent and the linked magnet of the United gate doors are at least as simple as were the refrigerator door latches that this Court analyzed in determining the question of infringement in *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30.

II(b)

Although admitting that in overturning the Trial Court's conclusion of infringement the Court of Appeals committed no literal violation of Amendment VII of the Constitution*, petitioner nevertheless argues that the Ap-

* "* * * and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, other than according to the rules of the common law."

pellate Court "violated a right secured to petitioner by Amendment VII" (petition, p. 13). The gist of petitioner's position is "* * * that a trial court's finding is equivalent to a jury's verdict * * *" (petition, p. 17).

A complete answer is this Court's pronouncement in the *Gypsum* case that "judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings * * * by a jury * * *" (333 U. S. 364, 395).

Amendment VII of the Constitution limited Article III thereof only as to facts tried by a jury.* As to all other cases, Congress has unlimited discretion to grant both original and appellate jurisdiction, including the power of appellate review of the law and the facts, to courts inferior to this Court, in any manner that it sees fit.**

By an Act of June 19, 1934 (28 U. S. C. 723 b, c*** now 28 U. S. C. 2072), Congress empowered this Court to prescribe by general rules the practice and procedure in civil actions in law and to unite the general rules in equity with those at law while preserving the constitutional

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* *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 377.

** *Martin* v. *Hunter*, 1 Wheat. 304, 388; *Insurance Company* v. v. *Dunn*, 19 Wall. 214, 226.

*** "§ 723b.

The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law * * *."

"§ 723c.

The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."

right of trial by jury. In actions such as that at bar which are tried by the court without a jury, appellate review is governed by Rule 52(b) prescribed by this Court, which has the force of a statutory enactment of Congress, and is not governed by the constitutional restriction on the review of facts tried by a jury.

III

Putting form of words before substance or meaning, petitioner strongly suggests that the language of the Court of Appeals when it said it was "unable to agree" with the District Court's conclusion of infringement indicates a failure to find the Trial Court's conclusion "clearly erroneous" as required by Rule 52(a) (petition, pp. 5, 12).

This Court has defined the language of the rule in the *Gypsum* case, *supra*. In the quotation from the *Gypsum* case appearing at page 8 of this brief, a "clearly erroneous" finding is defined as one where the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. The Court of Appeals here expressed just such a definite and firm conviction when, upon a review of all the undisputed documents and physical evidence, it said:

> "This brings us to the correctness of the District Judge's holding that the United gate infringes the Whann patent. With this conclusion of the District Court, we are unable to agree." (R. 293.)

The inability to agree with the correctness of the holding is unmistakably expressive of a finding that the holding is clearly in error. Inability to agree denotes an effort to follow through to the conclusion reached,—an effort that fails because of the clear error of that conclusion.

The rule imposes no requirement as to what language should be adopted by a reviewing court to express its

conclusion of clear error. There is no difference in substance between the phrase "a mistake has been committed,"* "this finding is against the clear weight of the evidence"** and "With this conclusion * * * we are unable to agree." The unreasoning adherence to phraseology that petitioner suggests does violence to modern legal interpretation. Speaking of the duties of the judge in interpreting statutory language, Judge Learned Hand said:

> "* * * On the one hand he must not enforce whatever he thinks best; he must leave that to the common will expressed by the government. On the other, he must try as best he can to put into concrete form what that will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed" (*Usatorre* v. *The Victoria,* 172 F. 2d 434, 2 Cir., 1949, footnote at p. 443).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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October 24, 1950.

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* *United States* v. *Gypsum Co., supra,* at page 395.
** *Fleming* v. *Palmer,* 123 F. 2d 749, 759 (1 Cir., 1941).